

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-197

COMMONWEALTH

vs.

FRANKIE CHANO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a three-day trial in the Superior Court, a jury convicted defendant Frankie Chano of five counts of assault and battery on a correction officer with bodily fluids (spitting) and one count of assault and battery. The defendant appeals his convictions, arguing that, (1) in light of the defendant's conduct immediately before and during the trial, the judge abused his discretion in finding the defendant competent and in failing to order a competency evaluation pursuant to G. L. c. 123, § 15 (a), and (2) the judge erred in failing to order the aid in sentencing evaluation, see G. L. c. 123, § 15 (e), requested by counsel following the jury's guilty verdicts. For the reasons that follow, we affirm.

Background. We summarize the record, reserving certain facts for later discussion. In his mid-forties at the time of

trial, the defendant had a history of mental illness. He had been committed to Bridgewater State Hospital pursuant to G. L. c. 123, § 18, approximately one year before trial. The defendant had a record of violence both in the community and in the correctional setting dating back to his teen years, including in the court house and its holding cell. The defendant's violent behavior often occurred in connection with his being physically touched by, or required to submit to the authority of, correction and court house staff.

The judge was sensitive to the issue of the defendant's competency and raised it before trial. However, in response to the judge's inquiry the day before trial, defense counsel responded that competency was not "at issue." Later that day, the judge went to the house of correction with counsel and, on the record, spoke with the defendant at some length.

Back in court the following day, the judge held a hearing on the defendant's motion to discharge his attorney. During that hearing, the judge had a lengthy exchange with the defendant in which the defendant demonstrated an understanding of, among other things, his attorney's role, his right to hire an attorney privately, and the potential exposure that the defendant faced on the charges to be tried. Shortly thereafter, the defendant complained of a medical problem and refused to return to the court room. The judge, noting "no signs of a lack

of competency," declined defense counsel's request for a "mental" evaluation. The defendant was brought into the court room, but shortly thereafter made a profane verbal outburst and needed to be restrained. Back in the holding cell, the defendant remained "out of control," and continued to "scream[] and yell[]." Based on the judge's safety concerns, the defendant was ultimately returned to the house of correction.

Given the option, the defendant chose not to return to the court house for the remainder of the trial. While counsel represented that he was able to discuss necessary strategic points with his client, on the third day of trial, defense counsel again raised the issue of the defendant's competency. The judge did not order an evaluation.

Discussion. Competency evaluation. In determining whether a criminal defendant is competent to stand trial, a judge must determine "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him."

Commonwealth v. Vailles, 360 Mass. 522, 524 (1971), quoting Dusky v. United States, 362 U.S. 402, 402 (1960). The judge's obligation to conduct a hearing where appropriate does not depend on a defendant's raising the issue. Commonwealth v. Martin, 35 Mass. App. Ct. 96, 98-99 (1993). A defendant's

mental illness alone, however, does not require a finding of incompetence, nor does "every instance of abnormal behavior . . . trigger the hearing requirement." Id. A judge is required to hold a hearing on competence only where the defendant's competence is subject to "bona fide doubt" as to the defendant's ability to understand the proceedings or to consult with counsel. Id. at 99, quoting Pate v. Robinson, 383 U.S. 375, 385 (1966). We review the judge's competency decision for an abuse of discretion, Vailes, supra, giving the judge's determination "substantial deference." Commonwealth v. Brown, 449 Mass. 747, 759 (2007).

Here, the judge had several opportunities to see and to speak with the defendant, including while the defendant was acting out in the court room. It is clear that the judge did not entertain doubts about the defendant's competency; to the contrary, the judge made an explicit finding that the defendant was competent. See Commonwealth v. Robbins, 431 Mass. 442, 448-449 (2000). We are unpersuaded by the defendant's argument that the "dramatic[]" change in his behavior on the first day of trial raised a question of his competence to stand trial. The judge, aware of the defendant's history, declined to order the defendant to be evaluated for competency. In light of the contrast between the defendant's compliant behavior in court when pursuing his own ends (being permitted to air his

grievances against his attorney, e.g.), and his violent reaction to being required to do that which he did not wish to do (come to the court house or into the court room against his wishes, e.g.), we conclude that the judge could reasonably have concluded that the defendant's actions were the result of a choice, and not a reflection of his incompetence to stand trial. We discern no abuse of discretion in the judge's failure to have the defendant evaluated for competency.

Aid in sentencing evaluation. Upon the defendant's convictions, defense counsel moved for an aid in sentencing evaluation to be conducted at Bridgewater State Hospital. See G. L. c. 123, § 15 (e). Citing scarce resources and his intention to review the report generated in connection with the § 18 commitment the defendant had completed some months earlier, the judge declined.<sup>1</sup> We review the judge's denial of the defendant's request for the aid in sentencing evaluation for an abuse of discretion, see Commonwealth v. O'Connor, 7 Mass. App. Ct. 314, 321 (1979) (judge may, but need not, order aid in sentencing evaluation), and find no such abuse here. As his

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<sup>1</sup> We recognize the different purposes behind a commitment under § 18 and an evaluation pursuant to § 15 (e). Compare G. L. c. 123, § 18 (a) (examining physician or psychologist required to evaluate and report on prisoner's "need [for] further treatment and care at a facility . . . by reason of mental illness"), with G. L. c. 123, § 15 (e) (purpose of court-ordered evaluation is "to aid the court in sentencing").

sentencing memorandum makes clear, in crafting the defendant's sentences here, the judge considered a number of permissible factors, including the defendant's recent mental health records. The judge's concerns about the appropriate use of scarce mental health resources were, in the circumstances, reasonable, and we infer that his decision to impose sentence immediately was motivated by the justified safety concerns that permeated the trial.

Judgments affirmed.

By the Court (Wolohojian,  
Milkey & Hand, JJ.<sup>2</sup>),



Clerk

Entered: July 23, 2019.

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<sup>2</sup> The panelists are listed in order of seniority.